84-581

No. 84- .

Office - Supreme Court, U.S.
FILED
OCT 1 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

CHARLES P. MAHONEY,
PETITIONER,

v.

FRANK J. TRABUCCO, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY
AND
MASSACHUSETTS STATE BOARD OF RETIREMENT,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

WAYNE B. HOLLINGSWORTH,
Counsel of Record,
DAVID M. BANASH,
PAMELA NEWTON JOSEPH,
THERESA A. KELLY,
HOLLINGSWORTH & ASSOCIATES,
10 Union Wharf,
Boston, Massachusetts 02109.
(617) 227-5100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

5 1 P 8

Questions Presented.

I. Whether the definition of the term "occupational" as it is used in the bona fide occupational qualification exemption to the Age Discrimination Act of 1967, 29 U.S.C. § 623(f)(1), refers to the actual duties regularly performed or reasonably likely to be performed by the individual or to the duties of all persons within "a recognized and discrete vocation" regardless of the actual duties of the individual.

II. Whether, even if the term "occupational" as used in said statute refers only to a discrete vocation, the First Circuit Court of Appeals erred in assuming that Mr. Mahoney's position as a communications specialist is not such a recognized vocation.

III. Whether the First Circuit Court of Appeals erred in concluding that all members of the Massachusetts State Police, including Mr. Mahoney, are subject to unrestricted transfer where the District Court found that there was only a "bare possibility" that Mr. Mahoney would be transferred.

Table of Contents.

Opinions below	1
Jurisdiction	2
Statute involved	2
Statement of the case	2
Reasons for granting the writ	5
I. The decision of the First Circuit Court of Appeals conflicts with prior decisions of other federal courts of appeals	5
II. The First Circuit Court of Appeals erred in failing to abide by the congressional intent in enacting the ADEA and the clear mandate of this court	7
III. The standard promulgated by the First Circuit is vague and fails to give sufficient guidelines for its application	9
IV. The important public policy consideration inherent in the ADEA compel that the issue presented by this petition be determined by this court	9
V. The First Circuit Court of Appeals erred in reaching legal conclusions that are unsupported by the facts	10
Conclusion	11
Appendix	follows page 11

Table of Authorities Cited.

CASES.

Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	8
Equal Employment Opportunity Commission v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980)	5, 6
Equal Employment Opportunity Commission v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982)	5n, 6

Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) 8
Johnson v. Baltimore, 731 F.2d 209 (4th Cir. 1984) 6
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 10
Tuohy v. Ford Motor Company, 675 F.2d 842 (6th Cir. 1982) 6

STATUTES.

28 U.S.C. § 1251(1) 2
29 U.S.C. §§ 621, et seq 2, 4
§ 621(b) 10
29 U.S.C. § 623(a) 2
29 U.S.C. § 623(f)(1) 2, 7
Massachusetts General Laws c. 32, § 26(3)(a) 4, 5

MISCELLANEOUS.

H.R. Rep. No. 95-527 Pt. 1, 95th Cong., 1st Sess. 12 (1977) 8
H.R. Rep. No. 805, 90th Cong., 1st Sess. 7 (1967), reprinted in U.S. Code & Ad. News 2213, 2220 7

No. 84- .

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

CHARLES P. MAHONEY,
PETITIONER,

v.

FRANK J. TRABUCCO, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY
AND
MASSACHUSETTS STATE BOARD OF RETIREMENT,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States Court of Appeals rendered on July 2, 1984 is reported at 738 F.2d 35 (1st Cir. 1984). A copy of that opinion is attached as Appendix A. The opinion of the United States District Court for the District of Massachusetts is reported at 574 F.Supp. 955 (D. Mass. 1983). A copy of the opinion and the judgment is attached as Appendix B.

Jurisdiction.

The judgment of the United States Court of Appeals was entered on July 2, 1984. Jurisdiction to review that judgment by writ of *certiorari* exists pursuant to 28 U.S.C. § 1251(1).

Statute Involved.

The statute principally involved in the opinion and order of the United States Court of Appeals and in this petition is the bona fide occupational qualification exemption provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, *et seq*. The relevant portions of the Act, 29 U.S.C. §§ 623 (a) and (f)(1), are reproduced in Appendix C.

Statement of the Case.

From July, 1957, until his retirement on July 25, 1984, Charles P. Mahoney was a member of the Massachusetts State Police. Mr. Mahoney attained the rank of sergeant and at the time of his retirement was the senior sergeant in the Massachusetts State Police.

From July, 1957, through approximately November, 1969, Mr. Mahoney performed all the regular duties of a member of the uniformed branch of the Massachusetts State Police. Such duties included driving a police cruiser on road patrol duty, participating in arrests, and assisting motorists on the Commonwealth's roads and highways. In November, 1969, Mr. Mahoney was enrolled in and subsequently completed a four-month training program as a Law Enforcement Agencies Processing Coordinator (hereinafter referred to as "LEAPS officer"). With the exception of a six-week period in either

1972 or 1973, Mr. Mahoney remained in the position of LEAPS officer from the time he completed the training program in early 1970 until his retirement in July, 1984.

While a LEAPS officer, Mr. Mahoney was assigned to the Criminal History Systems Board located at the general headquarters of the State Police in Boston, Massachusetts. Mr. Mahoney's duties were administrative in nature in that he acted as liaison officer to the unit, headed and staffed by civilians, that collects and exchanges computerized criminal justice data with other state and federal law enforcement agencies both within and outside the Commonwealth. In addition, Mr. Mahoney trained other state troopers and local police officers in the functioning of the LEAPS telecommunications network.

As a LEAPS officer, Mr. Mahoney worked an administrative work week, from 8:25 A.M. to 5:00 P.M., Monday through Friday. On a voluntary basis, Mr. Mahoney occasionally worked an overtime shift where he was assigned either to his regular LEAPS duties or to the communications compound at the state police headquarters in Boston.

In addition to his usual LEAPS officer duties, Mr. Mahoney was occasionally ordered to report for special assignments, all of which required his skills as a communications specialist. In 1980 when Pope John Paul II visited Boston and in 1976 during the Tall Ships celebration in Boston Harbor, Mr. Mahoney was assigned to the communications room at general headquarters as a desk officer dispatcher. During the blizzard of 1978 and the resulting state of emergency, Mr. Mahoney was ordered to a similar communications assignment.

Prior to these special assignments and approximately eleven to thirteen years ago, Mr. Mahoney was assigned as a radioman to a disturbance at the Massachusetts Correctional Institute at Norfolk. While the tactical unit specially trained in such operations handled the actual disturbance, Mr. Mahoney and other members of a contingent of communications representatives

established communications at the command post within the prison. A few years prior to the Norfolk disturbance, Mr. Mahoney had been assigned to a similar prison disturbance at the Massachusetts Correctional Institute at Walpole where he operated radio, telephone, and teletype operations at the State Police command post located in the administrative section of the prison.

The Massachusetts State Police requires all state troopers to undergo a biennial re-enlistment physical near the anniversary date of their enlistment before age 40 and an annual physical examination thereafter. At no time prior to his retirement was Mr. Mahoney informed that he had failed one of the mandatory physical examinations.

Massachusetts General Laws c. 32, § 26(3)(a) requires that all members of Group 3 of the uniformed branch of the State Police be mandatorily retired upon attaining age 50. Mr. Mahoney requested that he be permitted to remain with the State Police past the mandatory retirement age of 50. The request was denied. Mr. Mahoney reached his 50th birthday on September 15, 1983. He instituted the present action pursuant to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (hereinafter referred to as the "ADEA"), which prohibits discrimination in employment based on age, in order to prevent his involuntary retirement under the mandatory retirement statute. Based on the testimony of defendant's medical experts that age was no barrier to the performance of his administrative duties as a LEAPS officer and the unlikelihood of his being transferred to another assignment, the District Court concluded that Mr. Mahoney's duties were in essence those of an office worker holding a desk job. The District Court ruled that the defendants had failed to meet their burden of proving the bona fide occupational qualification defense set out in the ADEA. The District Court thereupon entered judgment in behalf of Mr. Mahoney and enjoined the

defendants from enforcing Massachusetts General Laws c. 32, § 26(3)(a) against him so long as he continued to work as a LEAPS officer.

On appeal, the United States Court of Appeals for the First Circuit reversed the lower court's decision. Rejecting the District Court's approach of evaluating the bona fide occupational qualification defense against the actual duties performed by Mr. Mahoney, the Court of Appeals announced that it was adopting a position between two earlier decisions rendered in the Seventh[1] and Eighth[2] Circuit Courts of Appeals. The Court stated that it was ascribing a new meaning to the term "occupational qualification" in the bona fide occupational qualification exemption that is separate from the term "particular business" therein and concluded that the term "occupational qualification" was synonymous with a recognized and distinct vocation. Mr. Mahoney was consequently retired from his position as sergeant in the Massachusetts State Police.

Reasons for Granting the Writ.

I. The Decision of the First Circuit Court of Appeals Conflicts with Prior Decisions of Other Federal Courts of Appeals.

The First Circuit's decision is in direct conflict with the rulings of three Courts of Appeals and with the apparent conclusion of one additional Circuit. In *Equal Employment Oppor-*

---

[1] *Equal Employment Opportunity Commission* v. *City of Janesville*, 630 F.2d 1254 (7th Cir. 1980).

[2] *Equal Employment Opportunity Commission* v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982).

tunity Commission v. *City of Janesville*, 630 F.2d 1254 (7th Cir. 1980), the Seventh Circuit held that the focus of the bona fide occupational qualification exemption is not the position of the individual facing involuntary retirement, such as that of police chief, but the duties of a generic class of law enforcement personnel employed to operate the "business" of a police department. Conversely, in *Equal Employment Opportunity Commission* v. *City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982), the Eighth Circuit ruled that the bona fide occupational qualification exemption in the ADEA requires that separate consideration be given to the different occupations within a fire department, such as that of fire chief, rather than consideration of a generic class of all firefighters. The Fourth Circuit adopted a completely different approach in *Johnson* v. *Baltimore*, 731 F.2d 209 (4th Cir. 1984), where the court ruled that whether age was a bona fide occupational qualification for Baltimore firefighters should be determined not by focusing on the duties of the firefighters as a generic class or on an individual's actual duties, but by resort to a "reasonable federal standard" set by Congress as the retirement age for federal employees. The Sixth Circuit Court of Appeals in *Tuohy* v. *Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982), has expressed the inclination to rule in accordance with the Eighth Circuit in that the court favorably quoted legislative history of the ADEA which requires a case-by-case approach in determining the application of the bona fide occupational qualification exemption.

In contrast to the rulings of the Fourth, Sixth, Seventh and Eighth Circuits, the First Circuit adopted a significantly different approach wherein it evaluated the bona fide occupational qualification defense in light of the "recognized" and "discrete" vocations within the employer's business. This split among the circuits has resulted in an uneven administration across the country of the prohibition against age discrimination in the ADEA. Thus, an individual's likelihood of remaining on his

job past a mandatory retirement age is not based on his ability to perform his job in a satisfactory manner but on the geographic boundaries of the Court of Appeals in which he is employed. The unfairness inherent in the current application of the ADEA may only be remedied by this Court's interpretation of the bona fide occupational qualification exemption therein and the promulgation of uniform guidelines applicable in all the Courts of Appeals. A writ of *certiorari* should be granted in order to resolve the current conflict among the circuits.

II. The First Circuit Court of Appeals Erred in Failing to Abide by the Congressional Intent in Enacting the ADEA and the Clear Mandate of This Court.

When Congress enacted the ADEA in 1967, it provided a narrow exception to the prohibition against age discrimination "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." 29 U.S.C. § 623(f)(1). At that time Congress also expressed the intention that individualized determinations be made regarding the exemption by including an admonition in the House Report accompanying the original ADEA:

> The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

H.R. Rep. No. 805, 90th Cong., 1st Sess. 7 (1967), *reprinted* in U.S. Code Cong. & Ad. News 2213, 2220. With regard to the application of the bona fide occupational qualification

exemption in so-called hazardous occupations, the House Report on the 1978 amendments to the ADEA, which raised the upper age limit to 70 years, indicated the continuing Congressional intent to focus on an individual's ability to perform his particular job:

> In most cases, more important than the possible decline of capabilities experienced with age is the fact that this decline varies with individuals as to age and intensity, varies in importance to particular jobs and may be compensated for by other attributes which often increase with age, for example, experience and judgment.

H.R. Rep. No. 95-527 Pt. 1, 95th Cong. 1st Sess. 12 (1977). Thus, as with any exemption to the provisions of a remedial statute, the scope of the bona fide occupational qualification exemption in the ADEA must be narrowly construed. *Corning Glass Works* v. *Brennan,* 417 U.S. 188 (1974).

Rather than complying with the Congressional intent and following well-settled rules of statutory construction, the First Circuit adopted an approach without precedent in any case law and contrary to this Court's ruling in *Equal Employment Opportunity Commission* v. *Wyoming,* 460 U.S. 226 (1983). There this Court stated that while "the State may still, at the very least, assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit . . ., the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case. . . ." 460 U.S. at 239. The approach adopted by the First Circuit discourages the individualized and careful case-by-case analysis envisioned by Congress and by this Court.

III. The Standard Promulgated By the First Circuit Is Vague and Fails to Give Sufficient Guidelines for Its Application.

Under the First Circuit's new definition of the term "occupation" within the bona fide occupational qualification exemption in the ADEA, a court deciding a mandatory retirement case must determine whether or not an individual's job is a "discrete" and "recognized" vocation. However, the courts have been given no guidelines with which to assess whether a vocation is "recognized," or by whom it must be so recognized. For example, whether the First Circuit Court of Appeals means that the vocation must be generally recognized by the public or whether the organization or business itself acknowledges the job as a vocational speciality is unclear.

In an age of increased specialization in which occupational categories rapidly emerge while others become obsolete, it is unrealistic to assume that there is any fixed or standard list of generally acknowledged vocational categories. Decisions attempting to apply such a test, therefore, would have limited precedental value and may rapidly become outdated. Consequently, the standard announced by the First Circuit would only serve to engender further litigation. This Court, therefore, should grant this petition and review the unworkable standard promulgated by the First Circuit Court of Appeals.

IV. The Important Public Policy Considerations Inherent in the ADEA Compel that the Issue Presented by This Petition Be Determined by This Court.

In enacting the ADEA the legislature declared a Congressional statement of the purpose of the act — namely, "to promote employment of older persons based on their ability

rather than age." 29 U.S.C. § 621(b). The proper definition of the bona fide occupational qualification exemption is, necessarily, fundamental to the enforcement of this remedial legislation and to the implementation of the stated Congressional purpose. Mr. Mahoney was retired pursuant to a state statute which requires retirement solely on the basis of age in the face of a finding that age imposed no barrier to the job he had actually performed or the job he was likely to perform in the future. Accordingly, the statute as applied to Mr. Mahoney is precisely the type of age discrimination the ADEA was enacted to prevent.

This Court has previously recognized the important question of the validity of the Massachusetts mandatory retirement statute but in a constitutional context in *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Significantly, the Court noted that there the plaintiff had made no claim under the ADEA. 427 U.S. at 310 n.2. Thus, this Court at present is left with having ruled on the validity of the statute without the benefit of a substantial legal challenge that crystallizes the important issue of age discrimination. The issue is now squarely before this Court. Under these unique circumstances, it would be particularly appropriate for this Court to decide Mr. Mahoney's case. The petition for *certiorari*, therefore, should be granted.

V. The First Circuit Court of Appeals Erred in Reaching Legal Conclusions that are Unsupported by the Facts.

The District Court found that Mr. Mahoney was not subject to unrestricted reassignment because there was no more than a bare possibility that he would be transferred out of the specialized position in which he had served for fourteen years.

The First Circuit, however, appeared to assume that Mr. Mahoney was in fact subject to such unrestricted transfer as part of a paramilitary organization which requires the performance of strenuous duties in any emergency. This assumption completely ignores the District Court's factual finding that, even if the Massachusetts State Police purports to be such a paramilitary organization requiring interchangeability of personnel, in reality there is no reasonable likelihood that Mr. Mahoney would ever be transferred from his position as LEAPS officer.

Further, the First Circuit appeared to automatically assume that Mr. Mahoney's position as a communications specialist was not a "recognized vocation." Since the parties did not have the benefit of the First Circuit decision promulgating a new statutory interpretation, the case was not tried on the issue of whether Mr. Mahoney's duties were sufficiently specialized to constitute a "recognized vocation." Rather than making an assumption unsupported by the facts, the First Circuit should have remanded the case for a determination of this issue.

Conclusion.

For the reasons discussed above, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

WAYNE B. HOLLINGSWORTH,
Counsel of Record,
DAVID M. BANASH,
PAMELA NEWTON JOSEPH,
THERESA A. KELLY,
HOLLINGSWORTH & ASSOCIATES,
10 Union Wharf,
Boston, Massachusetts 02109.
(617) 227-5100

Appendix.

Table of Contents.

Appendix A — Opinion of the United States Court of Appeals for the First Circuit, July 2, 1984 1a

Appendix B — Opinion of the United States District Court for the District of Massachusetts, November 10, 1983 15a

Judgment of United States District Court for the District of Massachusetts, November 15, 1983 32a

Appendix C — United States Code, Title 29 (a) & (f) 33a

Appendix A.

United States Court of Appeals for the First Circuit.

No. 83-1862.

CHARLES P. MAHONEY,
PLAINTIFF-APPELLEE,
v.
FRANK J. TRABUCCO, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, AND
MASSACHUSETTS STATE BOARD OF RETIREMENT,
DEFENDANTS-APPELLANTS.

Decided July 2, 1984

Appeal from the United States District Court for the District of Massachusetts.

Before: COFFIN and BOWNES, Circuit Judges, and GIERBOLINI,* District Judge.

COFFIN, Circuit Judge:

Defendants-appellants, Frank J. Trabucco, Commissioner, Massachusetts Department of Public Safety, and the Massachusetts State Board of Retirement, appeal a judgment finding that the Commonwealth violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, by mandatorily retiring plaintiff-appellee, Massachusetts State Police Sergeant Charles P. Mahoney, at age 50 pursuant to Mass. Gen. Laws ch. 32, § 26(3)(a). 574 F.Supp. 955.

---

*Honorable Gilberto Gierbolini-Ortiz, District Judge, United States District Court for the District of Puerto Rico, sitting by designation.

Massachusetts divides its state police force of somewhat more than 1,000 persons into a uniformed branch and non-uniformed branch. Members of the former receive a pension after twenty years service, which is more generous than that provided all other state employees. Mass.Gen.Laws Ann. ch. 32, § 26(3). They are also entitled by virtue of Mass.Gen.Laws ch. 32, § 94, to a presumption that any heart-related disability is job-related for disability retirement purposes. But they are also required to retire at age 50. Mass.Gen.Laws Ann. ch. 32, § 26(3)(a).[1] It is this requirement that is challenged in the case at bar.

Plaintiff-appellee, a veteran sergeant of the uniformed branch of the state police with over 26 years of service, reached his 50th birthday on September 15, 1983. Upon being notified that he had to retire on that date, he brought suit against defendants charging that his forced retirement under § 26(3)(a) would violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634.

Massachusetts claims that age 50 is a bona fide occupational qualification (BFOQ) for state police officers and that Mahoney's mandatory retirement was authorized under that section of the ADEA which provides:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization—

---

[1] This statute provides:

> "Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

Since another Massachusetts statute, Mass.Gen.Laws ch. 22 § 9A, has for many years prohibited the recruitment into the uniformed branch of those who have "passed" their thirtieth birthday, the practical effect of this statute is to require all members of the uniformed branch to retire at age 50.

> (a) to take any action otherwise prohibited under subsections (a),(b),(c), or (e) of this section *where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business*, or where the differentiation is based on reasonable factors other than age[.]" 29 U.S.C. § 623(f)(1) (emphasis added).

The district court, after a trial, issued a thoughtful opinion, concluding that Mass.Gen.Laws ch. 32 § 26(3)(a) is invalid as applied to plaintiff and that defendants must be enjoined from enforcing the statute against him "so long as he continues to work at his current assignment."

The court began by noting the generally accepted standard for evaluating the adequacy of a BFOQ defense as set forth in *Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976), and *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 753 (7th Cir. 1983). Under that standard an employer must show that the age qualification is "reasonably related to the 'essential operation' of its business, *and* must demonstrate, *either* that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, *or* that it is impossible or impracticable to determine job fitness on an individualized basis." *Orzel*, 697 F.2d at 753 (emphasis original) (footnote omitted).

Addressing the first part of this test, the court found the age requirement was reasonably related to the state police function of protection of persons, property, law and order, as indicated by *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (holding that the Massachusetts state police mandatory retirement age did not violate the equal protection clause). Then, after considering the testimony of a number of witnesses, the court concluded

that both the second and third prongs of the test had been met for members of the uniformed state police "generally". It held:

> "Uncontradicted medical testimony indicates that all or substantially all 50 year-olds could not safely and effectively perform the duties of a State Police officer. In addition, uncontradicted medical evidence indicates that it is impracticable or impossible for the Commonwealth to make individual determinations of an officer's fitness to serve on the State Police after age 50."

The court then turned its attention to the meaning of "duties of the job", and, following the approach of the Eighth Circuit in *E.E.O.C. v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982), rather than that of the Seventh Circuit in *E.E.O.C. v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980), decided that "the policies of the ADEA are best effected by evaluating the Commonwealth's BFOQ defense against the requirements of the job that Sergeant Mahoney has actually performed in the past and is likely to perform in the future", rather than the duties performed by uniformed state police officers generally.

Sergeant Mahoney, a 26 year veteran of the State Police, has spent the last 14 years at the Boston headquarters in an administrative capacity as liaison officer to a unit, headed and staffed by civilians, that collects and exchanges computerized criminal justice information with other law enforcement agencies, both within and outside Massachusetts. He also trains other officers in the use of the police telecommunications system. His work week is from 8:25 a.m. to 5:00 p.m., Monday through Friday. He occasionally volunteers for an overtime shift. He carries a gun, but wears civilian clothes. He is subject to reassignment and may be called to perform traditional police duties in the event of an emergency. During his service in this administrative post he has been called to special duty several

times. He was assigned road duty for six weeks in 1972, he worked as a "radio man" at two prison disturbances in the early 1970's, and he performed communications duties during the visit of the "Tall Ships" in 1976, the "Blizzard of 1978", and the visit of Pope John Paul II in 1980. Although he weighs some 255 pounds, and has a mild arthritic condition, he has never failed a biennial physical examination.

Based on this record, medical testimony that plaintiff's age is no barrier to the performance of his administrative duties, the likelihood that plaintiff would not be assigned to other duty, and the "bare possibility that the plaintiff may be called upon to perform strenuous physical activity in an emergency, the court held that the Commonwealth had failed to satisfy the BFOQ defense.

We begin our own analysis by observing the implications of the district court's approach. On the one hand, the whole idea of a BFOQ is to carve out a limited occupational field where an employer may enforce a retirement age requirement, free from the duty of making individual judgments, provided that the *Tamiami—Orzel* factors are established. On the other hand, the court, although finding that the uniformed branch of the state police was such a field, felt obliged to analyze the particular present and likely future work assignment of the plaintiff to see if an age requirement was justified as applied to that assignment. This means that within any strenuous occupation where age is likely to be a BFOQ—pilot, firefighter, policeman, game warden—any administrative or supervising assignment would, if found by a court likely to endure, not be subject to the requirement. In a paramilitary organization where, as here, all members are subject to service in emergencies and to reassignment, this would mean either that superannuated poor-risk persons would be subjected to the most demanding tasks or that the force would be restricted in calling out and reassigning desk-bound personnel. Under the court's

decision some members of the uniformed state police would not be available for general duties.

The district court was fully conscious of the problems posed by its fine-tuning approach. It noted that there is no correlation between rank and strenuous activity; officers in each rank may or may not be required to perform such activity. It recognized that "the possibility of inconsistent treatment of officers of the same rank may be expected to cause some difficulties," and that both officers approaching 50 and those in charge of duty assignments would have difficulty making assignment decisions. The court also acknowledged that the kind of particularistic case-by-case analysis it had undertaken "might interfere with the smooth operation of the state pension system." We would add that this approach may also tempt some to seek a "safe harbor" assignment, penalize the dutiful, discourage promotion, encourage litigation, and necessitate judicial determinations that turn on quality judgments, such as how sedentary is the assignment, and probability judgments, such as how long is the assignment likely to last and how likely is emergency duty.

Does the ADEA, as the district court concluded, mandate this approach? We think not. The BFOQ statutory exception applies "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). The word giving rise to the differing interpretation of the Seventh and Eighth Circuits is "occupational." In *E.E.O.C. v. City of Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980), the court held that a chief of police, being within "the generic class of law enforcement personnel", was subject to the age retirement requirement; it deemed the term "particular business" to the critical one, making irrelevant the fact that a particular occupation may be included within it. In *E.E.O.C. v. City of St. Paul*, 671 F.2d 1162, 1164-66 (8th Cir. 1982), the court held that "occupa-

tions" within a "business" should be examined and that a fire chief, being completely able to fulfill his duties, was not subject to the age retirement requirement.[2] It was concerned with the hazard of applying a BFOQ to any generic class as determined by a state; it noted, "state law could create a class of 'all state employees' and thereby allow the state to retire a clerk because he or she is too old to fight fires." 671 F.2d at 1166 (footnote omitted).

We take a position between these two decisions. Unlike the Seventh Circuit, we think we can ascribe a meaning to "occupational qualification" that is separate from "particular business."[3] We view "occupation" as a word of some breadth. Webster's applicable definition is: "The principal business of one's life: a craft, trade, profession or other means of earning a living . . . ." Webster's Third New International Dictionary 1560 (1966). For example, an airline is a "particular business", but within that business there are specific occupations with their own separate training, career progression, and age limitations, such as captain and first officer (retirement at age 60) and flight engineer (retirement at age 70). *See, e.g., Air Line Pilots Ass'n v. TWA*, 713 F.2d 940 (2d Cir. 1983) *cert. granted*, ___ U.S. ___, 104 S.Ct. 1412, 79 L.Ed.2d 739 (U.S. 1984); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544 (9th Cir. 1983).

When, however, a person signs up in a paramilitary uniformed force, where one is subject to generally unrestricted reassignment and performance of the most strenuous duties in any emergency, and undergoes the military training required of all recruits, with the expectation of receiving special pension

---

[2] A similar approach was followed in *E.E.O.C. v. City of Minneapolis*, 537 F.Supp. 750, 756 (D. Minn. 1982).

[3] Another reading of "occupational qualification that would give it separate meaning is "having to do with work," as opposed to a physical, sexual, racial, social, or educational qualification.

and disability benefits, we would be loath to equate particular "assignments", even if of long duration, to "occupations".

The Eighth Circuit case is susceptible of two interpretations. It dealt with the position of fire chief; arguably this position was sufficiently distinct to be considered an occupation separate from that of the rest of the department. But the court in *St. Paul* went on to say, "we cannot believe that the ADEA was intended to allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team." 671 F.2d at 1166. If this nicety of distinction were to govern, we would have to say that an age limit geared to those performing at critical times the most strenuous function of a unit could not be applied to those performing somewhat less strenuous functions. If such were the law, state troopers engaged in tracking down and apprehending car thieves and drug runners could be subjected to an age 50 retirement requirement, but those who merely had to chase speeders, to attend truck weighing stations, and to apprehend drivers under the influence of alcohol or without proper licenses would not be so subjected. This, we think, would atomize the general concept of "occupation".

Although we can understand why courts have interpreted the statute differently, we think that our interpretation is faithful to the words—that "occupational qualification" means more of a recognized and discrete vocation rather than a desk assignment for an employee subject to all the obligations and benefits of a quasi-military organization. We also feel, as indeed the district court conceded, that a contrary interpretation, which permits a particularistic analysis of the actual duties performed to overcome an otherwise justified BFOQ for similarly classified employees, would raise immeasurable problems of morale, administration, litigation, and adjudication. The question remains whether our preferred interpretation runs contrary to the discernible intent of the Congress.

The answer to this question is not advanced very far by recourse to the obvious policy of ADEA, "to promote employ-

ment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment." 29 U.S.C. § 621(b). A more germane inquiry focuses on the Congressional intent behind the BFOQ exception. The parties in their briefs have seized upon the 1977 Senate debate considering the ADEA amendments raising the generally protected age from 65 to 70.

Preliminarily we remark that, between the enactment of ADEA in 1967 and these debates in 1977, we know of only four cases applying the BFOQ. In all of these, the focus was on the class of employees to which the BFOQ applied; there was no suggestion that there might be exceptions within the class. *Usery v. Tamiami Trail Tours,* 531 F.2d 224 (5th Cir. 1976) (upholding company's refusal to hire those over 40 as inner city bus drivers); *Hodgson v. Greyhound Lines, Inc.,* 499 F.2d 859 (7th Cir. 1974) (upholding company's policy of not accepting bus driver applications from persons over 35); *Aaron v. Davis,* 414 F.Supp. 453 (E.D.Ark.) (striking mandatory retirement at age 62 for assistant city fire chief and district chief), *motion for reconsideration denied,* 424 F.Supp. 1238 (E.D. Ark. 1976); *McIlvanie v. Pennsylvania State Police,* 296 A.2d 630, 6 Pa.Comw. 505 (1972) (upholding the mandatory retirement of a state police officer at age 60 and rejecting notion that focus should be on the plaintiff's individual responsibilities as a troop commander, rather than on the responsibilities of the class as a whole). These cases of course do not imply that there cannot be fine tuning within a broad job classification; but they do show that the 1977 debate took place against the background of a broad brush application of the BFOQ defense by the courts.

Senator Williams, in commencing debate on the 1977 amendments, referred to his belief that there should not be a complete ban on mandatory retirement "where age has been established as a bona fide occupational qualification." 123

Cong.Rec. 34,296 (1977). In support of his position, the Senator continued:

> "In his letter endorsing the basic purposes of my bill, President Carter expressed the same concern and asked that in enacting this legislation we clearly permit the establishment of a designated retirement age of less than 70 where age has been shown to be an important indicator of job performance. *For some types of work, for example, law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age will be unable to continue performing their duties.*" *Id.* (emphasis supplied).

After a lengthy debate on amendments which would allow mandatory retirement as early as age 65 for tenured college and public school teachers and certain top business executives, Senator Griffin questioned an example Senator Javits had given for a BFOQ, that for airline pilots, opining that "[T]here could be many airline pilots at age 70 who would be able and fit to fly their planes." 123 Cong.Rec. 34,318 (1977). There followed this strange statement by Senator Javits:

> "The Senator caught me a little too fast. I did not mean to state that generically—that just because a person is an airline pilot he can be retired at age 60. All I meant to say was that the law permits that distinction to be made if the employer has a valid reason other than age. In other words, if the employer has factual proof of diminished capacity or an agency with regulatory authority finds that on the basis of skill and competence, quite apart from age, a person is unable to perform his duties as an airline pilot, the law permits that retirement. But the action must still be based on a factor other than age."

Plaintiff naturally stresses this language in support of his position. Of course it does support his position, in fact it goes far beyond. Indeed it is inconsistent with any concept of a BFOQ; the Senator's statement would limit retirement of airline pilots to those based on reasons "other than age". That this was an aberration became clear when, shortly thereafter, the Senator emphasized that "we intend that employers may establish a mandatory retirement age that is lower than age 70 . . . where the employer can demonstrate that there is an objective, factual basis for believing that virtually all employees above a certain age are unable to safely perform the duties of their jobs". He then read from the committee report an example of a justifiable BFOQ:

> "For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs. . . ." 123 Cong.Rec. 34,319.

Senator Griffin, not quite satisfied, asked:

> "I do not understand what the standard is supposed to be. Would he say, for example, that if most policemen are physically unqualified after age 65 to continue to serve on the police force, then all policemen could be required to retire at 65, rather than 70?" *Id.*

Senator Javits replied:

> "If it is reasonable, factually based, and can be justified as a bona fide occupational qualification for that type of employment." *Id.*

We conclude from these extracts that the Congressional intent revealed by this debate is consistent with a properly justified across-the-board BFOQ for a class of employees such as the uniformed branch of state troopers in the instant case.[4]

We draw further support from *E.E.O.C. v. Wyoming*, ___ U.S. ___, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). In that case the Court considered whether a challenge by a Wyoming game warden to the state's mandatory retirement age of 55 was barred by the doctrine of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). The Court looked at the nature of the burden on or interference with state policy constituted by the ADEA. It first noted that under the ADEA the state could still "assess the fitness of its game wardens and dismiss those wardens whom it reasonably finds to be unfit." ___ U.S. at ___, 103 S.Ct. at 1062. It continued with language stressed by the district court: "Put another way, the Act requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them." *Id.*

---

[4] We have also been cited to the following language in the Report of the House of Representatives Committee on Education and Labor on the 1978 amendments:

> "It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands age may be considered a factor in hiring and retaining workers. For example, jobs such as those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. The Committee, however, expects that age will be a relevant criteria for only a limited number of jobs[.]" H.R.Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977).

To the extent that this extract illumines our quest, we would say that it "tilts" toward our interpretation. "Jobs" seems to be used to describe very broad functional categories — traffic controllers, law enforcement and firefighting officials, all of which include administrative and other low pressure positions.

Coming to the point, the Court concluded its comments on the ADEA by writing "Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden." *Id.* (emphasis original).[5] Finally, and perhaps with most significance for this case, we note that the plaintiff in *E.E.O.C. v. Wyoming* was a game warden *supervisor*.

In passing, we take note of the fact that in 1974, when Congress extended ADEA coverage to state and local governments, it also established mandatory retirement ages for a number of federal public safety occupations. 5 U.S.C. § 8335.[6] We recognize that the Congress need not adhere to ADEA standards in setting mandatory retirement ages for federal personnel. *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 749 (7th Cir. 1983). *Cf. Johnson (E.E.O.C.) v. Mayor and City Council of Baltimore*, 731 F.2d 209 at 211-213 (4th Cir. 1984) (court relied on Congress' establishment of mandatory retirement at age 55 for federal firefighters in upholding identical requirement for Baltimore firefighters). But we do think it pertinent to note that the federal legislation includes in its definitions of law enforcement officer and firefighter "an employee . . . transferred to a supervisory or administrative position". 5 U.S. §§ 8331(20) and (21).

Finally, we acknowledge the possibility that a state could endeavor to sweep under one classification of employees many

---

[5] On remand, a jury upheld the 55 year mandatory retirement age as a BFOQ for Wyoming game wardens. *E.E.O.C. v. Wyoming*, No. C 80-0336 B (D. Wyo. 1983), *cited in E.E.O.C. v. Mayor and City Council of Baltimore*, 731 F.2d 209 at 212 n.7 (4th Cir. 1984).

[6] Those employees covered include agents of the FBI and the Secret Service, corrections officers, Immigration and Naturalization Service employees, U.S. Marshals, Bureau of Narcotics and Dangerous Drugs investigators, air traffic controllers, and federal firefighters.

distinct vocations and occupations for which a low mandatory retirement age would be quite unjustified. We think that our own approach, recognizing the need to focus not only on the "particular business" but also on genuine and well recognized occupations within such businesses, would prevent or remedy indiscriminate lumping together. Beyond that, of course, courts would not be powerless to remedy blatant or covert efforts to subvert the ADEA.

The judgment is reversed.

Appendix B.

United States District Court
District of Massachusetts

No. 83-2681-MA

CHARLES P. MAHONEY,
PLAINTIFF,

v.

FRANK J. TRABUCCO, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY,
DEFENDANT,
AND
MASSACHUSETTS STATE BOARD OF RETIREMENT,
INTERVENOR-DEFENDANT.

Decided November 10, 1983.

OPINION

MAZZONE, District Judge.

This action is brought under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*. Massachusetts State Police Sergeant Charles P. Mahoney challenges the Massachusetts statute that requires all members of the uniformed branch of the State Police to retire at age 50. The plaintiff turned 50 on September 15, 1983, and would have been retired by the state on the last day of September but for an order of this Court, issued on September 14, 1983, with the consent of the parties, enjoining the plaintiff's retirement pending a trial

on the merits. The case was tried to the Court on October 27 and October 28, 1983. Pursuant to Rule 52(a), Fed.R.Civ.P., I make the following findings and rulings.

Sergeant Mahoney seeks a declaration that the mandatory retirement statute, M.G.L. c. 32 § 26(3)(a), is invalid as applied to him, and seeks an order enjoining the defendants, the Commonwealth's Commissioner of Public Safety and the State Board of Retirement, from ordering his retirement in accordance with that statute. M.G.L. c. 32 § 26(3)(a) provides as follows:

> Any [member of the uniformed branch] who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

Although the statute by its terms provides for retirement at age 50 or after 20 years service, whichever comes later, as a practical matter the statute requires all but a few members of the uniformed branch to retire upon reaching 50, because a second statute, M.G.L. c. 22 § 9A, prohibits the State Police from enlisting individuals older than 30 for the uniformed branch.

This action is not the first challenge to the Commonwealth's mandatory retirement age for uniformed state troopers. In *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Supreme Court held that the statute was rationally related to a legitimate public purpose and did not, therefore, violate the Equal Protection Clause. *Id.* at 315, 96 S.Ct. at 2568. The Court explicitly noted, however, that the plaintiff in *Murgia* based his challenge to the statute strictly on constitutional grounds, and had not

invoked the protections provided by the ADEA. *Id.* at 310 n.2, 96 S.Ct. at 2565 n.2. That fact distinguishes *Murgia* from the present action; here, the plaintiff bases his claim squarely on the ADEA.

Enacted in 1967, the ADEA was the product of several years of study, by both Congress and the Executive Branch, of the problems of older Americans. See generally *E.E.O.C. v. Wyoming*, ___ U.S. ___, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). It was adopted to meet two pressing problems: the cost of age discrimination to the national economy and the harm done to individual workers deprived of the opportunity to remain active members of the nation's workforce. At the heart of the ADEA is 29 U.S.C. § 623(a)(1), which provides that "It shall be unlawful for any employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . . ."

As originally enacted, the ADEA did not cover employees of state and local governments. Those workers were brought within the Act's protection by an amendment adopted by Congress in 1974. Because the amendment extending the scope of the ADEA's coverage was part of a broader package of amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, there is little legislative history relating to the decision to subject state and local governments to the requirements of the Act. *E.E.O.C. v. Elrod*, 674 F.2d 601, 605 (7th Cir. 1982). The legislative history does, however, contain the remarks of Senator Bentsen, the sponsor of the amendment, upon its approval by the Senate. He said: "The passage of this measure insures that government employees will be subject to the same protections against arbitrary employment [discrimination] based on age as are employees in the private sector." 120 Cong.Rec. 8768 (1974), *quoted in Ramirez*

v. Puerto Rico Fire Service, 715 F.2d 694, 699 (1st Cir. 1983). The legislative history also contains a statement offered in support of the amendment by President Nixon in 1972, when it was first proposed:

> Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the National [sic] the contribution they could make if they were working.

H.R.Rep. No. 93-913, 93d Cong. 2d Sess., *reprinted in* 1974 U.S.Code Cong. & Ad. News 2811, 2849, *quoted in Ramirez v. Puerto Rico Fire Service*, 715 F.2d at 699.

In sum, then, the legislative history, though limited, supports the view that the Act was intended to outlaw ". . . irrational, unjustified employment decisions based upon assumptions about the relationship between age and ability which classify older workers as incapable of effective job performance." *E.E.O.C. v. Elrod*, 674 F.2d at 605.

Notwithstanding the broad remedial purpose of the ADEA, it is clear that not every age-based employment decision violates the Act. As the Supreme Court noted in *E.E.O.C. v. Wyoming*, ___ U.S. at ___, 103 S.Ct. at 1058, the case which freed from doubt the constitutionality of the 1974 amendment extending the ADEA to state and local governments, the states may establish mandatory retirement ages for state employees if they can prove that age is a "bona fide occupational qualification (BFOQ)" for the job that the plaintiff complaining of age

discrimination performs. It is this BFOQ defense which is the central issue in this action, as there is no doubt that the statutory mandatory retirement age constitutes a *prima facie* violation of the ADEA. The Commonwealth asserts, and sought to prove at trial, that age is a BFOQ for members of the uniformed branch of the Massachusetts State Police.

The BFOQ defense is embodied in 29 U.S.C. § 623(f)(1), which provides that:

> It shall not be unlawful for an employer, employment agency or labor organization . . . to take any action otherwise prohibited [by the statute] where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . .

The BFOQ defense has been the subject of considerable judicial scrutiny. With near unanimity, those courts that have addressed the scope of the BFOQ defense have followed the interpretation put forward by the court in *Usery v. Tamiami Tours, inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). Under that view of the BFOQ defense, which I follow here,

> . . . in order to prevail on a BFOQ defense, an employer must show that the challenged age qualification is reasonably related to the essential operation of the business, and must demonstrate either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized basis.

Orzel v. City of Wauwatosa Fire Dept., 697 F.2d 743, 753 (7th Cir. 1983). *See also E.E.O.C. v. University of Texas Health Science Center*, 710 F.2d 1091, 1093 (5th Cir. 1983);

E.E.O.C. v. City of St. Paul, 671 F.2d 1162, 1166 (8th Cir.1982); *E.E.O.C. v. Missouri State Highway Patrol*, 555 F.Supp. 97, 104 (W.D.Mo.1982); *E.E.O.C. v. City of Minneapolis*, 537 F.Supp. 750, 756 (D.Minn.1982).

Thus, under the prevailing legal standard, the threshold question is whether the mandatory retirement age is reasonably related to the essential operation of the Massachusetts State Police. This is a limited inquiry; I must assess the function of the State Police and determine whether the mandatory retirement age is reasonably related to that function. The essential function of the Massachusetts State Police is to protect and serve the citizens of the Commonwealth. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. at 310, 96 S.Ct. at 2565 ("The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and to maintain law and order."). I rule that the mandatory age requirement is reasonably related to the protection and service of the citizens of Massachusetts. In so ruling, I am guided by the Supreme Court's opinion in *Murgia*, as the initial focus of analysis in evaluating a BFOQ defense is on the reasonableness of the state policy, an inquiry in many respects similar to the inquiry in an Equal Protection case in which a traditional rather than strict or intermediate level of scrutiny is called for. As the Court held in *Murgia*, "[s]ince physical ability generally declines with age, mandatory retirement at age 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective." 427 U.S. at 315, 96 S.Ct. at 2567. Thus, I conclude that the Commonwealth has sustained its burden of proof on the first stage of the analysis used to determine whether age is a BFOQ.

The second part of BFOQ analysis is more rigorous. To sustain its contention that age is a BFOQ, the Commonwealth

must show either (a) that all or substantially all persons older than 50 cannot effectively perform the duties of the job or (b) that it is impossible or impracticable to determine on an individual basis whether persons older than 50 can effectively perform the duties of the job. This form of analysis raises an important preliminary question: How should the "duties of the plaintiff's job" be defined? The Commonwealth argues that the plaintiff's duties are those of a member of the uniformed branch of the State Police, and asserts that the Court should determine whether age is a valid BFOQ, generally, for members of the uniformed branch. The plaintiff asserts that his duties are different in many respects from those of most Massachusetts State Police officers, and asks that the Court determine whether age is a BFOQ for the work he performs from day to day. In order to present these alternatives in sharper relief, it is necessary to consider the plaintiff's current position with the State Police, and to review the evidence presented at trial about the work done by most members of the uniformed branch.

Sergeant Mahoney is a 26-year veteran of the State Police. Since November 1, 1969 he has been assigned to State Police General Headquarters in Boston, where he has worked as a telecommunications specialist. He serves as the State Police liaison with the Massachusetts Criminal History Systems Board and trains state and local police officers in the use of police telecommunications systems. He is responsible for maintaining the accuracy of certain crime records which he from time to time supplies to State Police officers and federal and local investigators. He works Monday through Friday, from 8:25 a.m. to 5 p.m., in contrast to the hours of most State Police officers, who work for four days, then have two days off. In sum, then, Sergeant Mahoney's daily routine is, in essence, that of an officer worker holding a desk job.

Sergeant Mahoney remains, however, a sworn member of the uniformed branch of the State Police. He carries a gun on

duty. He has a responsibility to aid citizens in emergencies on the state's highways. He is obligated to take action when criminal activity occurs in his presence. He is subject to transfer to another assignment, including one that involves road duty. He is also subject to call in an emergency situation such as a prison disturbance.

Since his assignment to General Headquarters 14 years ago, Sergeant Mahoney has only infrequently been called upon to respond to emergencies or fill in at other job assignments. For six weeks in 1972 or 1973, he was assigned to road duty at the State Police barracks in Andover. He was called to two prison disturbances in the early 1970's, one at the state prison at Walpole, the other at MCI-Norfolk. Sergeant Mahoney testified that his function at the scene of both disturbances was that of a "radio man." In 1976 he was assigned to communications duty during the bicentennial Tall Ships celebration. He acted as a communications officer during the Blizzard of 1978, and worked in the same capacity during the 1979 visit of Pope John Paul II. A number of Sergeant Mahoney's superior officers testified that he currently discharges his duties effectively and satisfactorily.

The majority of the members of the uniformed branch perform daily duties that are quite different from Sergeant Mahoney's, according to the testimony of the defendant Commissioner of Public Safety, Frank J. Trabucco, and the testimony of a number of other members of the uniformed branch, including several members of the command staff.

Some two-thirds of the approximately 1,040 members of the uniformed branch are responsible, from day to day, for patrolling the state's highways and responding to calls for assistance from members of the public or local police departments. Their jobs, in short, involve road duty. They are called upon to stop cars on the highway, make arrests, take suspects into custody and may on occasion be required to physically

subdue suspects resisting arrest. They work outside in the snow and are sometimes required to push vehicles or carry heavy objects through the snow. They sometimes find it necessary to chase suspects on foot over considerable distances. They are called upon to react to disturbances in the state prisons, and are required to report to work to aid the public in natural disasters and emergencies. They must on occasion engage in high speed chases. In sum, a state trooper assigned to road duty is not infrequently required to engage in strenuous physical activity and is subject to physical danger on some occasions. Officers who, like the plaintiff, enjoy the rank of Sergeant, are among those assigned to road duties, often as patrol supervisors, and in that capacity are exposed to the same kinds of physical stress and danger as many other members of the uniformed branch.

The medical evidence offered by the Commonwealth in support of its BFOQ defense reinforces the importance of determining whether the duties of the job at issue are those of a uniformed state police officer, generally, or those of an officer who performs the daily tasks that the plaintiff performs. The Commonwealth called two medical experts, Dr. Alexander Lind, a physiologist, and Dr. Albert Antlitz, a cardiologist. Dr. Lind testified that, on average, an individual's aerobic capacity decreases 30% between the ages of 20 and 50. He testified that he had heard Massachusetts State Police officers give evidence during the trial about the nature of their jobs, and that he had also talked to State Police officers before the trial began. He concluded that all or substantially all individuals over 50 lacked the aerobic capacity to perform the duties of Massachusetts State Police Officers safely and effectively.

Dr. Antlitz, the cardiologist, testified that, at age 50, 75% of the population suffers from substantial but asymptomatic coronary artery disease. This presents no significant difficulty for most individuals, he testified. But it poses extreme hazards

to individuals suffering from coronary artery disease who perform the duties of Massachusetts state troopers and, in addition, creates danger to the safety of the public that the troopers are charged with protecting, he said. He also testified that it is possible to predict which asymptomatic individuals were likely to experience coronary incidents—myocardial infarctions, angina, or the like—with only 1 percent accuracy.

However, both doctors testified that, in their opinions, age was not a BFOQ for a position that involved the daily activities that Sergeant Mahoney typically performs. Substantially all individuals could perform that kind of work for many years after age 50, they said.

The plaintiff offered no medical evidence to rebut the testimony of the Commonwealth's medical experts. Thus, were I to rule that the duties of the job at issue in this case are the duties of a member of the uniformed branch, generally, rather than the duties that the plaintiff actually performs, I would conclude that the Commonwealth had met its burden of proof on the BFOQ defense.[1] Uncontradicted medical testimony indicates that all or substantially all 50 year-olds could not safely and effectively perform the duties of a State Police officer. In addition, uncontradicted medical evidence indicates that it is impracticable or impossible for the Commonwealth to make individual determinations of an officer's fitness to serve on the State Police after age 50.

Thus, in order to determine whether further analysis is necessary, I must determine whether it is the duties of uniformed State Police officers generally, or the duties regularly performed

---

[1] This ruling is intended only as a judgment on the evidence presented at trial. I do not rule that age 50 is a BFOQ for State Police officers as a matter of law; individual cases are likely to turn on the medical evidence presented at trial. As noted above, the plaintiff herein presented no such evidence and, therefore, the uncontradicted medical evidence presented by the Commonwealth compels this conclusion in this case.

by Sergeant Mahoney, that are relevant to this dispute. This is essentially a question of statutory interpretation. The Commonwealth argues that the language of the BFOQ defense, which creates an exception when age-based employment practices are ". . . reasonably necessary to the normal operations of the *particular business*. . ." (emphasis supplied), requires that I consider the validity of the BFOQ in relation to the "particular business" at issue—that is, the entire uniformed branch of the State Police. In support of its position the Commonwealth relies upon *E.E.O.C. v. Janesville*, 630 F.2d 1254 (7th Cir.1980). In *Janesville*, the Court of Appeals reversed a district court decision holding that the particular duties of the plaintiff, a police chief, rather than the duties of city police officers generally, should determine whether a BFOQ defense to an action attacking a mandatory retirement age should prevail. The Court of Appeals held that Congress' use of the words "particular business" foreclosed the district court from considering the specific job duties of particular plaintiffs. Such an interpretation, the court said, would effectively change the words "particular business" to "particular occupation"—a result that Congress itself could have accomplished had it so desired. Thus, in order to prevail on its BFOQ defense, the city need only prove that age was a BFOQ defense for city police officers generally.

On the other hand, in a case involving similar facts, the Eighth Circuit Court of Appeals rejected the Seventh Circuit's *Janesville* reasoning. *See E.E.O.C. v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982). In *City of St. Paul*, the Court of Appeals affirmed a district court judgment that treated fire chiefs differently than rank-and-file firefighters for the purposes of evaluating a BFOQ defense to a challenge to a mandatory retirement ordinance. The court concluded that Congress' use of the word "occupational" in creating the BFOQ defense permitted courts to consider the particular duties of

individuals facing mandatory retirement. The court also relied on the Congressional statement of the purpose of the legislation, set out in the language of the ADEA itself, 29 U.S.C. § 621(b)—namely, "to promote employment of older persons based on their ability rather than age." The court said:

> It would be inconsistent with the goal of ability-based decisions to allow a city to retire a fire chief or a police chief who was completely able to fulfill his duties because he was unable to fulfill the duties of another position within the department, such as a fire captain or patrolman . . . *We cannot believe that the ADEA was intended to allow a city to retire a police dispatcher because that person is too old to serve on a SWAT team* (emphasis supplied).

Id. at 1186.

After consideration of the language of the statute, and the policy aims that prompted Congress to adopt it, I conclude that the position taken by the court in *E.E.O.C. v. City of St. Paul* represents the better view. The statutory language uses both the words "occupational" and "business." I cannot conclude, therefore, that the language of the statute is so clear as to forbid consideration of the specific duties of particular persons. More important, as the Supreme Court noted in *E.E.O.C. v. Wyoming*, the ADEA requires a state to make determinations about the retirement of its employees "in a more individualized and careful manner. . ." 103 S.Ct. at 1062. The adoption of the ADEA substantially increased the measure of federal legal protection afforded older Americans. Private and public employees can no longer cut short careers by relying on stereotypes about what older people can and cannot do, or on labels about what a job does or does not require—more is necessary. In my judgment, the policies of the ADEA are best

effected by evaluating the Commonwealth's BFOQ defense against the requirements of the job that Sergeant Mahoney has actually performed in the past and is likely to perform in the future. To evaluate the state's BFOQ defense against the more demanding requirements of the typical member of the uniformed branch would only serve to perpetuate the stereotyping and labelling that the ADEA was designed to prohibit, and would ignore the Act's instruction to treat older Americans on the basis of individual ability.

As noted above, the Commonwealth's medical experts testified that, in their opinion, age was not a BFOQ for a job which requires the level of exertion that Sergeant Mahoney's does on a day-to-day basis. This testimony does not, by itself, establish that age is not a BFOQ for Sergeant Mahoney's position, however. As the plaintiff and his commanding officers testified, two sets of factors distinguish the duties of Sergeant Mahoney from the routine of a civilian whose job requires the identical level of day-to-day exertion. First, the plaintiff is subject to transfer at any time, and could be transferred to a road position—that of patrol supervisor, for example —which involves substantial physical stress. The medical evidence presented at trial suggests that age is a BFOQ for many of the positions to which the plaintiff could be transferred. Second, Sergeant Mahoney remains a sworn member of the uniformed branch of the State Police. As such, he is subject to call for emergency duty and is responsible for taking action when he observes criminal activity. I shall consider each of these factors in turn.

It is undisputed that the Commissioner of Public Safety has absolute authority to transfer the plaintiff to an assignment that would require more strenuous physical activity. At trial, however, Commissioner Trabucco testified that it was very likely that Sergeant Mahoney would not be reassigned unless he failed to perform his duties effectively. Sergeant Mahoney's

telecommunications job requires some technical expertise, Commissioner Trabucco testified (though less expertise than State Police ballisticians or fingerprint experts), a factor which decreases the likelihood that Sergeant Mahoney will be reassigned. Commissioner Trabucco testified that he could not of course "guarantee" that the plaintiff would not be reassigned. But the evidence indicates that the possibility of reassignment is quite speculative and, in my judgment, the chance that Sergeant Mahoney may be reassigned to a job for which age is a BFOQ is, on the evidence presented, of only limited importance in determining whether the state has sustained its burden of proof on the BFOQ defense. *See E.E.O.C. v. City of Minneapolis*, 537 F.Supp. 750, 757 (D.Minn.1982) (Because plan to reorganize department, so as possible to require plaintiff police captain to perform more strenuous duties is speculative, ". . . the [court's] decision must be based on the duties of a police captain at the time of his trial.").

The fact that the plaintiff may be called on special assignment, and is required to intervene when he observes criminal activity, is also of limited importance here, in my judgment. The evidence established that Sergeant Mahoney has been called to arguably risky special assignments on only three occasions in the past 14 years and has acted in his capacity as a telecommunications specialist each time. In addition, Sergeant Mahoney testified that he could not remember the last time that circumstances required that he intervene at the scene of a crime. For these reasons I conclude that the bare possibility that the plaintiff may be called upon to perform strenuous physical activity in an emergency does not appreciably alter the analysis of the duties of the job he performs. *Id., see also Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) (in Title VII action, the fact that female plaintiff would be required to handle a 34 pound fire extinguisher in an emergency merited little consideration).

Because the medical experts who testified at trial agreed that age imposed no barrier to an individual's continued performance of a job whose duties require only the level of exertion that plaintiff performs from day to day, and I conclude that the fact that Sergeant Mahoney is a sworn member of the uniformed branch is unlikely to alter the physical dimension of the duties of his job, I rule that the Commonwealth has failed to meet its burden of proving the BFOQ defense.

In so ruling, I am not unaware of certain considerations of policy that argue in favor of a contrary result. I have considered the possibility that this ruling might be viewed as favoring those members of the uniformed branch whose duties may not require top physical condition and who, therefore, would not be subject to the mandatory retirement age. My fears in this regard are allayed by Commissioner Trabucco's testimony that, with only a few exceptions, a particular officer's physical fitness—or lack thereof—is not taken into account when decisions about assignments or calls to emergency duty are made. In addition, officers receive physicals every two years, and these examinations could serve as a means to evaluate the ability of any officer to remain with the State Police. Indeed, this is the kind of case-by-case decision-making that the ADEA was designed to encourage.

Also, as noted above, the Commissioner has the authority to transfer the plaintiff to another post. I must assume that that authority will always be used in furtherance of the essential function of the State Police to protect and serve the citizens of the Commonwealth.

I am also aware that the method of analysis I have used, which focuses on the specific duties of particular persons, could lead to a state of affairs in which some, but not all, of the members of the uniformed branch may be retired upon reaching age 50. This problem is exacerbated by the fact that the amount of physical activity members of the uniformed

branch are required to perform does not, according to Commissioner Trabucco's testimony, vary in a regular and consistent way with rank—some officers of a given rank may be required to engage in strenuous activity on the job, others may not. In an organization whose structure is modelled on the military, the possibility of inconsistent treatment of officers of the same rank may be expected to cause some difficulties. Nonetheless, the history of the ADEA suggests that the 1974 amendments extending coverage to public employers was intended to subject the age-based employment practices of state governments to the same intense scrutiny as the practices of private employers. The ADEA calls upon the state to treat each of its employees according to his or her ability to get the job done. And, as the Supreme Court has held in the closely related Title VII sex discrimination context, *see Lorrillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978), the BFOQ defense was ". . . in fact meant to be an extremely narrow exception . . ." to the proscription of discrimination. *Dothard v. Rawlinson*, 433 U.S. 321, 334, 97 S.Ct. 2720, 2729, 53 L.Ed.2d 786 (1977).[2]

Therefore, for the reasons stated above, I find and rule that M.G.L. c. 32, § 26(3)(a) is invalid as applied to the plaintiff, and I enjoin the defendant and the intervenor-defendant Massachusetts Board of Retirement from enforcing that statute

---

[2]I do not, of course, venture predictions about the outcomes of ADEA actions that other State Police officers might bring. It is likely, however, that resolving thse issues in court, on a case-by-case basis, will have certain adverse consequences. First, individual officers nearing the age of 50 may find it difficult to make informed decisions about their futures. Second, the State Police command staff may find it difficult to make duty assignments without substantial uncertainty about the duration that any individual will be able to remain at a particular post. Third, a case-by-case analysis might interfere with the smooth operation of the state pension system. Perhaps a more careful delineation of functions within the uniformed branch is required in order to recognize the purposes and policies underlying the ADEA.

against him so long as he continues to work at his current assignment.[3]

SO ORDERED.

---

[3] After trial, the Court allowed the plaintiff's motions to amend his complaint in order to conform the prayer for relief with the evidence introduced at trial. *See* Fed.R.Civ.P. 15(a)-(b) (leave to amend shall be freely given when justice so requires, even after trial). The defendants opposed the motion. The Court may in any event grant only that relief which the plaintiff has proved he is entitled to; here, the plaintiff has demonstrated that *he* is entitled to relief and, as noted above, the law supports the view that *his particular duties* are relevant. The defendants suffer no prejudice from my reaching a decision of narrower scope than that originally sought by the plaintiff.

Appendix B.

United States District Court
District of Massachusetts.

No. 83-2681-MA

CHARLES P. MAHONEY,
PLAINTIFF,

v.

FRANK J. TRABUCCO, ET AL.,
DEFENDANTS.

JUDGMENT

This action came to trial or hearing before the Court with the Honorable A. David Mazzone presiding. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED: Judgment for the plaintiff. M.G.L. c. 32 Section 26(3)(a) is invalid as applied to the plaintiff, and the defendant, Frank J. Trabucco, Commissioner, Massachusetts Department of Public Safety and the intervenor-defendant, Massachusetts State Board of Retirement are enjoined from enforcing that statute against the plaintiff so long as he continues to work at his current assignment.

DATED: November 15, 1983

/s/ Deputy Clerk
United States District Court

Appendix C.

AGE DISCRIMINATION IN EMPLOYMENT ACT

United States Code, Title 29:

"Section 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization —

1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;"

Office - Supreme Court, U.S.
FILED
NOV 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLES P. MAHONEY,

Petitioner,

v.

FRANK J. TRABUCCO, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, and MASSACHUSETTS STATE BOARD OF RETIREMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

H. Reed Witherby,
Counsel of Record
Thomas A. Barnico
Assistant Attorneys General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-1020

38pp

QUESTION PRESENTED

In a challenge under the Age Discrimination in Employment Act to a Massachusetts law which requires all State Police officers to retire at the age of fifty, is the proper focus of the "bona fide occupational qualification" defense upon the duties to which all state troopers are subject, or upon each individual officer's particular assignment?

PARTIES

This Brief in Opposition is submitted on behalf of the respondents: the Massachusetts Commissioner of Public Safety (Frank J. Trabucco) and the Massachusetts State Board of Retirement (referred to collectively herein as "the Commonwealth").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

Introduction 3

The Trial 5

The District Court Decision 10

The First Circuit Decision 12

REASONS FOR DENYING THE WRIT 13

I. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT. 14

II. THE CONFLICT AMONG THE CIRCUITS IS OVERSTATED. 16

The Fourth Circuit 17

The Sixth Circuit 18

The Seventh Circuit 19

The Eighth Circuit 19

The Decision Below 20

III. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH CONGRESSIONAL INTENT. 22

IV. THE FIRST CIRCUIT DECISION IS CONSISTENT WITH PUBLIC POLICY. 23

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

E.E.O.C. v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980) 19, 20, 21

E.E.O.C. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) 19, 20, 21

E.E.O.C. v. County of Santa Barbara, 666 F.2d 373 (9th Cir. 1982) 7

E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091 (5th Cir. 1983) 6

E.E.O.C. v. Wyoming, 460 U.S. 226 (1983) 14, 15, 21, 27

Heiar v. Crawford County, ___ F.2d ___, 35 EPD ¶ 34,614 (7th Cir., Aug. 20, 1984) 7, 25

Johnson v. Mayor & City Council of Baltimore, 731 F.2d 209 (4th Cir. (1984), petition for cert. filed, No. 84-518 17, 25

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 16

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 3, 4, 6

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 16

Touhy v. Ford Motor Company, 675 F.2d 842 (6th Cir. 1982) 18, 19

Statutes

Mass. G.L. c. 32, § 26(a)(3) 3, 4, 6

P.L. 93-350, 88 Stat. 356 17, 24

5 U.S.C. § 8335 17, 24

28 U.S.C. § 1254(1) 2

29 U.S.C. §§ 621 *et seq.* 5

29 U.S.C. § 623(f)(1) 2, 5, 17, 27

Miscellaneous

H.R. 9281 before the Subcomm. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 93rd Cong., 2d Sess. (April 24, 1974) 24

No. 84-531

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLES P. MAHONEY,

Petitioner,

v.

FRANK J. TRABUCCO, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, and MASSACHUSETTS STATE BOARD OF RETIREMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-14a) is reported at 738 F.2d 35. The opinion of the District Court (Pet. 15a-31a) is reported at 574 F. Supp. 955.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1984. The petition was filed on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case presents a question of the correct interpretation of 29 U.S.C. § 623(f)(1), which provides in pertinent part:

> It shall not be unlawful for an employer . . .
>
> > (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . .

The Massachusetts law which is challenged by the petitioner, Mass. Gen. Laws Ann. c. 32, § 26(a)(3), provides in pertinent part:

> Any [member of the uniformed branch of the Massachusetts State Police] who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

STATEMENT OF THE CASE

Introduction

This is not the first time this Court has had occasion to review the Massachusetts law dealing with State Police mandatory retirements. In Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976), this Court upheld, against an Equal Protection attack, the require-

ment of Mass. Gen. Laws Ann. c. 32, § 26(3)(a) that all members of the Uniformed Branch ("troopers") of the Massachusetts State Police must retire upon reaching the age of fifty. As Murgia succinctly noted: "The primary function of the Uniformed Branch of the Massachusetts State Police is to protect persons and property and maintain law and order. Specifically, uniformed officers participate in controlling prison and civil disorders, respond to emergencies and natural disasters, patrol highways in marked cruisers, investigate crime, apprehend criminal suspects, and provide backup support for local law enforcement personnel." 427 U.S. at 310. Murgia held that it was rational for the Legislature to believe that such duties would be performed most safely and effectively by persons under fifty.

On September 13, 1983, the petitioner, a Sergeant in the Massachusetts State Police, brought this suit challenging that same classification under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq. A two-day trial was held, in which the only issue was whether the statutory mandatory retirement age was lawful as a "bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business" of the Massachusetts State Police. 29 U.S.C. § 623(f)(1).

The Trial

At the trial, the Commonwealth introduced evidence directed to a generally recognized, two-part test for evaluating whether an age classification qualifies as a BFOQ:

> (1) the classification must be reasonably necessary to the essence of the employer's business; and (2) the employer must have reasonable cause, that is, a factual basis, for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983); see Pet. 3a (First Circuit), 19a (District Court). That evidence included testimony concerning the duties of the State Police and expert testimony relating age to the ability to perform such duties safely and effectively.

Murgia made clear that Mass. Gen. Laws Ann. c. 32, § 26(3)(a) satisfied the first part of the BFOQ test. Pet. 3a (First Circuit), 20a (District Court).

As to the second part, the Commonwealth shouldered the burden of proving a factual basis for the classification.[1/] The expert testimony of a physiologist established that substantially all individuals over 50 lack the aerobic capacity to perform safely and effectively the duties of Massachusetts State Police officers. In addition, a cardiologist testified that the increased incidence, over age 50, of asymptomatic coronory artery disease would make it dangerous to the public safety and to the troopers themselves for troopers to continue to perform State Police duties beyond that age, and that tests could not accurately

---

1/ See Heiar v. Crawford County, ___ F.2d ___, 35 EPD ¶ 34,614 (7th Cir., Aug. 20, 1984) at p. 34,724; E.E.O.C. v. County of Santa Barbara, 666 F.2d 373, 376 (9th Cir. 1982).

identify which troopers were not at risk by virtue of this condition. Based upon this factual presentation by the Commonwealth, the District Court concluded:

> Uncontradicted medical testimony indicates that all or substantially all 50 year-olds could not safely and effectively perform the duties of a State Police officer. In addition, uncontradicted medical evidence indicates that it is impracticable or impossible for the Commonwealth to make individual determinations of an officer's fitness to serve on the State Police after age 50. Pet. 24a.

Sergeant Mahoney contended, however, that the BFOQ defense should focus not upon the duties of the State Police generally (to which he admittedly was subject), but instead upon the duties which specifically defined his "particular assignment." Sergeant Mahoney worked in an office with civilians, coordinating information from a computer. Pet. 4a,

21a. He argued that if he were a civilian performing that same assignment, age would not have been a BFOQ. The Commonwealth countered that the petitioner was different from his civilian co-workers because he was, by occupation and in fact, a police officer. The Commonwealth further contended that it was entitled to treat Sergeant Mahoney as a member of that class, as to which age was indisputably a BFOQ. As the District Court found, on the basis of the evidence as to Sergeant Mahoney's duties:

> Sergeant Mahoney remains, however, a sworn member of the uniformed branch of the State Police. He carries a gun on duty. He has a responsibility to aid citizens in emergencies on the state's highways. He is obligated to take action when criminal activity occurs in his presence. He is subject to transfer to another assignment, including one that involves road duty. He is also subject to

call in an emergency situation such as a prison disturbance. Pet. 21a-22a.

The District Court Decision

The District Court went on, however, to side with Mahoney on the critical issue in this case, concluding that the ADEA required the Commonwealth to make individualized determinations of whether age was a BFOQ, and that the relevant focus for BFOQ analysis was upon the actual duties of the particular assignment of each individual trooper as he reached the age of 50. Pet. 24a-27a. Analyzing Sergeant Mahoney's situation, the District Court felt that it was "speculative" that he would be reassigned, and that there was only "the bare possibility" that he would be called upon to perform strenuous physical activity in an emergency. Pet. 28a; see Pet. 5a. On

the strength of these conclusions, the District Court enjoined the respondents from retiring Sergeant Mahoney "as long as he continues to work in his current assignment." Pet. 30a-31a.

The District Court's decision turned, therefore, upon its forecast that it was "unlikely" that the petitioner would in fact be called upon for any physical police activities if he was permitted to remain a State Police officer. Pet. 29a. The District Court thereby imposed yet another burden upon the respondents: in addition to showing that the classification was reasonably necessary to the essence of the business of the State Police (as the District Court found had been done), and to proving that age was a BFOQ for the State Police duties to which the petitioner was subject (which the Dis-

trict Court's findings of fact collectively established), the Commonwealth was to be required to show "likelihood" that a critical situation would occur in which Sergeant Mahoney in particular would be called out, or that an incident would occur to which his duties would require him to respond, or that he would be transferred to a more demanding assignment. The respondents argue below that the BFOQ exemption to the ADEA was not intended to require such a showing.

The First Circuit Decision

As is explored in more detail in the argument, the First Circuit held that the proper focus of the BFOQ inquiry was upon the duties of state troopers generally, and that the uncontradicted testimony that age was a BFOQ for such duties was sufficient to establish the BFOQ de-

fense under the ADEA for all State Police officers. Pet. 5a-8a, 12a-13a. Rejecting the District Court's focus upon an individualized, assignment-by-assignment BFOQ determination, the First Circuit held that the validity of a mandatory retirement statute under the bona fide occupational qualification exemption should be measured by reference to recognized and discrete vocations, such as State Police officer, rather than by a particularistic analysis of the actual duties "likely" to be performed by each specific individual. Pet. 6a-8a, 13a-14a.

REASONS FOR DENYING THE WRIT

The First Circuit correctly held that the proper focus of the BFOQ defense under the ADEA in a public safety context

is upon broadly defined public safety occupations, rather than upon particular assignments. For the following reasons, the writ should be denied.[2/]

I. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The petitioner asserts that the First Circuit decision is in conflict with E.E.O.C. v. Wyoming, 460 U.S. 226 (1983). Pet. 8. But that case held that States

---

2/ Of the three questions set forth in the Petition, the second and third are simply attempts to reargue the facts found in this particular case, and clearly are not appropriate for review. Contrary to petitioner's assertions (Pet. 10-11), Sergeant Mahoney himself testified that he was subject to unrestricted transfer, see Pet. 4a, 22a, and that his occupation was that of "State Police officer." Tr. 6. The District Court and the Court of Appeals agreed that, if BFOQ focusses broadly rather than narrowly, the defense was factually established. Pet. 12a, 24a.

could continue to promote public safety through mandatory retirement laws, if they could establish that age was a bona fide occupational qualification for such occupations.

The petitioner quotes this Court as stating that the ADEA "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case," 460 U.S. at 239, but ignores the crucial qualification which follows: "Perhaps more important, appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden." Id. at 240 (emphasis in original). This Court thus drew a distinction between individualized determinations on the one

hand, and proof of BFOQ on the other; and the Commonwealth provided the required demonstration through its uncontested expert testimony at trial in this case.

II. THE CONFLICT AMONG THE CIRCUITS IS OVERSTATED.

A conflict among the circuits will not justify review unless it is "real and embarassing." Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955), quoting Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923). There is no such real and embarassing split here, and the petitioner engaged in a considerable overstatement when he suggests (Pet. 5-7) that five circuit Courts of Appeals are split on the issue presented.

The Fourth Circuit

Johnson v. Mayor & City Council of Baltimore, 731 F.2d 209 (4th Cir. 1984), petition for cert. filed, No. 84-518, did not address the question presented by the Petition in this case. Johnson held that age 55, by virtue of P.L. 93-350, 88 Stat. 356, codified at 5 U.S.C. § 8335(b), which mandates retirement for most federal firefighters upon reaching that age, is reasonable and lawful under 29 U.S.C. § 623(f)(1) for all state and local firefighters. 731 F.2d at 212-13. As a result of this ruling, it was unnecessary for the Fourth Circuit to address the proper focus of the BFOQ in the absence of such a per se federal standard. To the extent that the Fourth Circuit approach in Johnson sustains the validity of a mandatory retirement provision for

a broadly defined class of firefighters, that result is consistent with the decision below.

The Sixth Circuit

Nor does Tuohy v. Ford Motor Company, 675 F.2d 842 (6th Cir. 1982), address this issue: there was no dispute in that case concerning the focus of the BFOQ inquiry. The question instead was whether Ford could rely, in support of an age 60 mandatory retirement for its corporate pilots, upon an age-60 rule of the Federal Aviation Administration which applied to commercial but not corporate pilot licenses. The holding in Tuohy was simply that Ford could not rely upon the FAA rule, but must instead "present a factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that

a pilot who has reached age 60 will become incapacitated during flight." 675 F.2d at 846.

The Seventh Circuit

In E.E.O.C. v. City of Janesville, 630 F.2d 1254 (7th Cir. 1980), the Seventh Circuit held that the BFOQ defense should focus upon the "particular business" of law enforcement, not upon the particular duties of a police chief. 530 F.2d at 1258. This holding is certainly not in conflict with the result below.

The Eighth Circuit

The Eighth Circuit in E.E.O.C. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982), rejecting Janesville, held that the duties of a fire chief were sufficiently distinct from those of a fire-

fighter so as to be treated separately. 671 F.2d at 1164-66. Although St. Paul conflicts with Janesville, its rationale does not necessarily conflict with the decision below, with which it shares a focus upon occupations.

The Decision Below

The District Court in this case expressly adopted the Eighth Circuit approach, Pet. 26a, but, in the respondents' view, went beyond it in focussing upon particular assignments. Since age was not a BFOQ for the particular assignment of Sergeant Mahoney, but was a BFOQ for the state police duties to which he was subject, the appeal was taken as a pure issue of law with reliance upon the approach of the Seventh Circuit.

Although petitioner argues that the First Circuit decision perpetuates and

expands this conflict, the appropriate perspective is that it tends to resolve it. In a process of balancing and reconciling the various interests underlying the prior decisions, the First Circuit ruled that the correct BFOQ focus is upon an occupation in the sense of "vocation," a concept falling between the Seventh Circuit's emphasis on "particular business" on the one hand, and the Eighth Circuit's emphasis on the duties of a particular position on the other. Pet. 6a-8a. This approach tends to resolve the conflict between Janesville and St. Paul, not to create or perpetuate a conflict. In addition, as noted above, the First Circuit decision was faithful to the intervening consideration of the BFOQ exemption in E.E.O.C. v. Wyoming, 460 U.S. 226 (1983).

III. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH CONGRESSIONAL INTENT.

The statutory language of the BFOQ provision could hardly be more plain. Congress did not provide that age must be a BFOQ for each individual employee's "particular assignment;" it provided instead that age must be a BFOQ "reasonably necessary to the normal operation of the particular business."

The evidence demonstrated, and the District Court found, that age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business of the Massachusetts State Police. In inquiring further into whether age was a BFOQ for the plaintiff's particular assignment, the District Court imposed upon the state a burden not contemplated or authorized by Congress.

The petitioner argues that the First Circuit decision was contrary to the general congressional intent underlying the ADEA. Pet. 7-8. The more relevant question is whether the First Circuit was faithful to the specific congressional intent underlying the BFOQ exemption. Legislative history relevant to this question is marshalled at Pet. 12a-15a by the First Circuit, and demonstrates that the congressional intent "is consistent with a properly justified across-the-board BFOQ for a class of employees such as the uniformed branch of state troopers in the instant case." Pet. 12a.

IV. THE FIRST CIRCUIT DECISION IS CONSISTENT WITH PUBLIC POLICY.

As the First Circuit noted (Pet. 13a), the same Congress which extended

coverage of the ADEA to federal, state, and local governments established mandatory retirement for federal public safety occupations. P.L. 93-350, 88 Stat. 356 (1974), codified in part at 5 U.S.C. § 8335. These federal age limitations reflect congressional acceptance of the same policy objectives which underlie the mandatory retirement of Massachusetts State Police officers. As Senatory Percy remarked:

> "It is the intent of this legislation to help federal law enforcement and firefighters agencies maintain a relatively young, vibrant, and effective work force, both for the safety of individual officers, and for the society which they serve."

Hearings on H.R. 9281, before the Subcomm. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 93rd Cong., 2d Sess.

(April 24, 1974).[3/]

The purposes of public safety forces raise important public policy considerations in the face of an age discrimination claim. The protection of the safety of its citizens is one of the most fundamental responsibilities of a state. In order to carry out that responsibility effectively, the state must retain some reasonable discretion to require each individual in a public safety force to be available for physical tasks, even though the likelihood of physical in-

---

3/ The First Circuit decision is not based upon the rationale of Johnson v. Mayor and City Council of Baltimore, 731 F.2d 209 (4th Cir. 1984), that the federal statutes make age 55 per se reasonable and therefore a BFOQ for public safety positions. See also Heiar v. Crawford County, supra at p. 34,730 (Gibson, S.C.J., dissenting); but see id. at p. 34,725-26 (majority opinion).

volvement in a particular assignment may be small. Physical requirements for public safety officers cannot responsibly be based on the least, rather the most demanding of potential assignments or duties.

Contrary to the petitioner's assertions (Pet. 9-10), the "particular assignment" approach has adverse public policy implications. Under the analysis of the District Court, a force designed and prepared for rapid response to major crises may not justify age limitations intended to enhance preparedness by identifying its most physically stressful assignments. Rather, according to the District Court, the state must demonstrate, to some undetermined degree of probability, that each officer reaching the maximum age is "likely" to perform

physical tasks. This burdensome requirement undermines effective law enforcement and would thwart the terms and purpose of the BFOQ exemption.

By drawing the BFOQ defense provided in § 623(f)(1) to such narrow compass, the District Court also exposed the Commonwealth to an endless series of lawsuits, each suit considering the particular duties and assignments of specific individuals. The dissent in E.E.O.C. v. Wyoming, supra, commented that the defense of such lawsuits "is a costly and time-consuming endeavor that is, in itself, a burden impermissible for Congress to impose on the states." 460 U.S. at 258 n. 5 (Burger, Ch. J., dissenting).

Restriction of the BFOQ defense to particular assignments would encourage some officers approaching fifty to avoid

physical activity that might jeopardize their claim under the ADEA. They might, for example, seek safe harbor at an administrative assignment, hopeful that their sinecure will turn out to insulate them from the rigors of other duties and insure their tenure beyond age 50. At worst, those in active positions might avoid physical tasks required by their duties or necessitated by crises such as prison disturbances. Under these circumstances, the District Court's interpretation of the BFOQ defense would pit the personal interest of the officer against the oath of his office and the mission of the Massachusetts State Police. These personal conflicts can collectively thwart the protection of the citizens of Massachusetts.

The District Court's approach would, by contrast, penalize the conscientious officer who takes carrying out the essential function of the State Police more seriously. Those officers, not having shirked from demanding assignments, would be subject to mandatory retirement as a result. The District Court appeared to sense, correctly, that there was a fundamental inequity to its decision on this score. Pet. 29a-30a.

Significantly, the interpretation of the BFOQ exemption adopted by the First Circuit does not remove the burden from the state to prove a factual basis for age restrictions, nor does it compromise the protection afforded the individual by the ADEA against arbitrary discrimination. This approach to the BFOQ still permits the trier of fact to weigh the

evidence submitted on the affirmative defense and thereby to judge the factual basis for, and reasonableness of, the age restriction.

Application of the exemption to the State Police force thus creates no conflict with the terms or purposes of the ADEA. Rather than undermining the individual protections of the law, the First Circuit approach to the exemption tracks the dual Congressional purposes of prohibiting arbitrary age discrimination without impairing or inhibiting rational, factually justified employment decisions in hazardous public safety businesses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

H. Reed Witherby,
Counsel of Record
Thomas A. Barnico
Assistant Attorneys General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-1020

Stanley E. Adelman
General Counsel
Executive Office of
Public Safety
Room 2133